

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

PRINCE MONTGOMERY,

Defendant-Appellant.

UNPUBLISHED

June 15, 2006

No. 259896

Muskegon Circuit Court

LC No. 04-050622-FH

Before: O’Connell, P.J., and Murphy and Wilder, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of carrying a concealed weapon, MCL 750.227, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced defendant to concurrent terms of 3-1/2 to 30 years’ imprisonment for his convictions for carrying a concealed weapon and felon in possession of a firearm, and to a mandatory two years’ imprisonment for the felony-firearm conviction. Defendant appeals as of right. We affirm.

On July 18, 2004, Muskegon Heights police officers were dispatched to an area where gunshots were reported. Upon arriving at the scene within minutes of the dispatch, one officer saw two men matching the description of the alleged perpetrators. These men proceeded quickly to a car and entered. They then anxiously watched the officer drive past them. Based on the surrounding circumstances and the men’s suspicious behavior, the officer stopped their vehicle. Defendant, the driver, subsequently consented to a search of the vehicle, and a handgun was found in the trunk of the car. Defendant was arrested. On appeal, defendant asserts that he received ineffective assistance of counsel, that the trial court erred in denying a motion to suppress, and that he was not properly credited for time served while awaiting trial.

I

Since defendant failed to move the trial court for an evidentiary hearing or a new trial based on ineffective assistance of counsel, review is limited to mistakes apparent on the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). Factual findings are reviewed for clear error, while constitutional determinations are reviewed de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). Effective assistance of counsel is presumed, and the defendant has a heavy burden of proving otherwise. *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). In order to establish ineffective assistance of counsel, the attorney’s

performance must have been “objectively unreasonable in light of prevailing professional norms” and “but for the attorney’s error or errors a different outcome reasonably would have resulted.” *People v Harmon*, 248 Mich App 522, 531; 640 NW2d 314 (2001). The defendant bears the burden of proving that his counsel was ineffective.

Defendant claims that his trial counsel’s failure to conduct an evidentiary hearing on his motion to suppress and his act of simply stipulating to the facts set forth by the prosecution, constitutes ineffective assistance of counsel and was not a matter of trial strategy. On the record before us, we cannot conclude that defense counsel’s conduct was “objectively unreasonable.” The important facts stipulated to for purposes of the suppression motion were consistent with testimony at trial. Moreover, the record does not support the conclusion that, if an evidentiary hearing been held, the relevant facts would have been different from those to which trial counsel stipulated. We therefore reject defendant’s claim because trial counsel’s actions were not objectively unreasonable and because defendant has not demonstrated that, but for the trial counsel’s actions, a different outcome would have resulted.

II

In considering a motion to suppress evidence, we review a trial court’s factual findings to determine if they are clearly erroneous and reviews a trial court’s conclusions of law de novo. *People v Snider*, 239 Mich 393, 406; 608 NW2d 502 (2000). We will only determine that a finding of fact is clearly erroneous if, after reviewing the entire record, we are left with a definite and firm conviction that a mistake has been made. *People v Dagwan*, 269 Mich App 338; 342 (2005).

Defendant asserts that the trial court incorrectly denied his motion to suppress and considered evidence at trial which was secured after a search subsequent to an illegal stop. Defendant claims that the traffic stop of his vehicle was illegal, and that accordingly, the gun found in the trunk was “fruit of a poisonous tree” and should have been suppressed.

To justify an investigative stop, police must have a particularized suspicion, based on an objective observation, that the person has been, is, or is about to be engaged in some type of criminal activity. *People v Taylor*, 214 Mich App 167, 169; 542 NW2d 322 (1985). The particularized suspicion must derive from the police officer’s assessment of the totality of the circumstances. *Id.* The reasonable suspicion needed for an investigative stop requires a showing considerably less than a preponderance of the evidence. *People v Oliver*, 464 Mich 184, 202; 627 NW2d 297 (2001).

Viewing the circumstances surrounding the event, we conclude that the trial court did not err in finding that it was reasonable for the officer to stop defendant. Defendant and his passenger were seen in the immediate vicinity of a shooting; they matched the descriptions provided to the officer from dispatch; no one else matching the description was in the area; defendant and his passenger were observed by the officer emerging from an alley and quickly jumping into a car; and they suspiciously watched the police officer. Based on the totality of the circumstances, we find that there was a reasonable, articulable basis to stop defendant. There was more than “just a hunch” of criminal activity. *People v LoCicero*, 453 Mich 496, 502; 556 NW2d 498 (1996). Further, after the stop, defendant provided consent to search the vehicle. The subsequent search revealed the handgun, which lead to defendant’s arrest. On a motion to

suppress, it is a question of fact for a trial court to determine on the basis of an assessment of the totality circumstances whether a person has freely and voluntarily consented to a search. *Dagwan, supra*, at 342. The evidence presented sufficiently confirms that consent was freely and voluntarily given. The motion to suppress was properly denied.

III

Defendant's last argument on appeal is that he was entitled to sentencing credit, against his new sentences, for time served in jail while awaiting trial. The question whether defendant was inappropriately denied credit for time served in jail before sentencing, as provided in MCL 769.11b, is an issue of law that is reviewed de novo. *People v Givans*, 227 Mich App 113, 124; 575 NW2d 84 (1998).

We find no error. Defendant was on parole at the time of his arrest. MCL 791.238(2) provides in relevant part that, "a parolee arrested for a new criminal offense, held on a parole detainer until his conviction, is not entitled to credit for time served in jail on the sentence for the new offense." MCL 791.238(2). Credit is granted for time served in jail as a parole detainee, but that credit is only applied to the sentence for which the parole was granted. MCL 791.238(2). A parolee who is sentenced for a crime committed while on parole must serve the remainder of the term imposed for the previous offense before he serves the term imposed for the subsequent offense. *People v Meshell*, 265 Mich App 616, 638; 696 NW2d 754 (2005). The trial court's decision, to not credit defendant with time served, was therefore in compliance with the applicable statutes and comports with justice.

Defendant's reliance on MCL 769.11b is misplaced. When a defendant is held in jail on a parole detainer, bond is neither set nor denied. Therefore, MCL 769.11b is not applicable to the facts of this case. *People v Seiders*, 259 Mich App 538, 541; 675 NW2d 611 (2003).

Affirmed.

/s/ Peter D. O'Connell
/s/ William B. Murphy
/s/ Kurtis T. Wilder